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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

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KUMHO TIRE COMPANY, LTD., KUMHO U.S.A., INC., and HERCULES TIRE & RUBBER COMPANY, INC.

*Petitioners,*

v.

PATRICK CARMICHAEL, AN INDIVIDUAL AND FATHER AND NEXT OF KIN TO PATRICK CARMICHAEL, JR., A MINOR, LUZVIMINDA CARMICHAEL, AN INDIVIDUAL, MOTHER AND NEXT FRIEND OF CARINA HORN, A MINOR, AND ADMINISTRATRIX OF THE ESTATE OF JANICE HORN, CARINA HORN, A MINOR, LEONA CARMICHAEL, SHAMEELA CARMICHAEL, NATIMAH CARMICHAEL,

*Respondents.*

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# BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

◆

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## INTEREST OF THE *AMICUS CURIAE*

The Defense Research Institute ("DRI") is an organization with members throughout the United States numbering in excess of 21,000. It seeks to advance the cause of the civil justice system in America by ensuring that the concerns of the defense bar and potential defendants are properly and adequately represented. These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of law, and through testimony before Congress on select legislation impacting the civil justice system. DRI provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.*

All parties have granted a blanket consent to the filing of *amicus curiae* briefs, including this brief.

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*Pursuant to Rule 37(6) of the Rules of the Supreme Court of the United States, DRI states that counsel for Petitioners and Respondents had no part in authoring any portion of this brief. No one other than the DRI made a monetary contribution to the preparation or submission of this brief.

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## I. SUMMARY OF ARGUMENT

The civil jury, a fundamental element of American jurisprudence, uniquely preserves public participation in our civil justice system. While other countries, including our English jurisprudential ancestors, have essentially eliminated the civil jury, we scrupulously guard this constitutional right. But, our civil juries have been increasingly attacked, criticized, and questioned. This case, involving expert testimony judicially determined to be speculative and unreliable, presents an insidious threat that fuels current criticisms. If left intact, the Eleventh Circuit's decision in this case, and others like it, is capable of permanently undermining public confidence in the present civil justice system, leading to the *de facto*, if not *de jure*, extinction of our civil jury.

Economic, statistical, technological, and scientific data is increasingly important in today's litigation. Our need for and reliance upon witnesses with scientific, technical, or other specialized knowledge has increased commensurately. But, expert evidence can be both powerful and misleading because, by nature, it is generally beyond the layperson's experience and understanding, difficult to evaluate, and deceptively enticing. And unfortunately, the observation that there is nothing, not palpably absurd on its face, that cannot be proved by a so-called "expert" is made more often than ever.

Judicial control is needed. While undoubtedly the jury is the final arbiter charged with resolving disputed issues of material fact, including the credibility of the witnesses, it cannot be seriously suggested that once a witness is qualified as an expert, he or she is free to testify to anything within the area of his or her expertise. Courts exist to create procedures from which fair, equitable, and reliable outcomes will presumably flow. The rules governing our courts exist to ensure that the truth may be ascertained and

proceedings justly determined. No judge, no lawyer, and no citizen can question that our civil trials must be fair, consistent, and free of errors. And no one can question that reliable outcomes result from reliable evidence; reliable outcomes, certainly, are not the product of unreliable evidence. Society cannot afford and will not tolerate wrong results. If the jury system does not produce consistently reliable outcomes, it will be replaced with a system that does. Or worse, it will not be replaced.

Not all of the ills can be cured or all of the criticisms answered in a single case. Yet, a strong statement empowering trial judges to demand that all experts, whether physical scientists, economists, accountants, psychologists, physicians, sociologists, statisticians, or engineers, demonstrate that their opinions have been derived by the same methodology and with the same intellectual rigor that experts in the same field employ to ensure reliability in their professional work, will address concerns, real and perceived, that expert witnesses are mercenaries whose biased testimony frequently produces erroneous and inconsistent determinations.

Admittedly, not all of Daubert's "four guideposts" will be meaningful in assessing all fields of expert inquiry and testimony, but the trial judge's gatekeeper role is no less important when confronted with unreliable technical, engineering or social science evidence than when confronted with the unreliable "scientific evidence" found in Daubert and Joiner. The trial judge can and should identify the equivalent to the "four guideposts" used by experts in the particular field to ensure the reliability of their professional conclusions (there may only be two, but perhaps five). This will allow the trial judge to understand how experts in the particular field test reliability in their profession outside the courtroom. If the expert has not employed the methodology used by his profession to ensure reliability outside the



courtroom, his testimony in the courtroom can only impede the trial's sole source of legitimacy, its search for the truth.

DRI recognizes, indeed exists because, there are litigated questions upon which reasonable people can reach opposing conclusions. We welcome these opportunities to submit the persuasiveness of our competing viewpoints to our communities' juries. But, we should not be before these juries either sponsoring "expert" opinions or debunking "expert" opinions that have been reached by individuals who fail to employ the methodology adopted by their peers to ensure reliability throughout their field of expertise.

## II. ARGUMENT

### A. "The Right of Trial By Jury In Civil Cases At Common Law is Fundamental to Our History and Jurisprudence."[1]

DRI agrees that "the right to a trial by jury is a great constitutional right" that "should be jealously guarded by the Court." Town of Grand Chute v. Winegar, 82 U.S. 373, 21 L.Ed. 174, 15 Wall. 373 (1872); Jacob v. City of New York, 315 U.S. 752, 753, 62 S.Ct. 854, 854, 86 L.Ed. 1166 (1942). Among DRI's guiding principles is its commitment to "improving the civil justice system and preserving the civil jury."[2] It too believes "[t]he scrutiny of twelve honest jurors provides defendant and plaintiff alike a safeguard from arbitrary perversion of the law and preserves the old principle that law flows from the people."[3]

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[1]Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 338, 99 S.Ct. 645, 655, 58 L.Ed.2d 552 (1979) (Rehnquist,J., dissenting).

[2]Defense Research Institute Mission Statement.

[3]Winston Churchill, 1956.

The Eleventh Circuit's decision in this case, however, threatens the civil jury system. While it does not present a direct attack upon the civil jury, it does present a more insidious assault far more likely to undermine the continued use of civil juries - speculative and unreliable expert testimony.

### B. "The Basic Purpose of the Trial is the Determination of Truth. . . ."[4] Today, the Search for the Truth is More Complicated Than Ever Before.

There is little meaning in a constitutional right that litigants choose not to exercise or attempt to avoid.[5] No greater threat to the civil jury exists than the perception or reality that it fails to reach reliable outcomes. The Federal Rules of Civil Procedure and Evidence exist for just this purpose. See, Fed.R.Civ.P. 1 (These rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."); Fed.R.Evid. 102 ("These rules shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."); United States v. Scheffer, -- U.S. --, 118 S.Ct. 1261, 1265,

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[4]Tehan v. United States ex rel. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453 (1966).

[5]See e.g., Kent D. Syverud, ADR and the Decline of the American Civil Jury, 44 UCLA L. Rev. 1935 (August 1997) ("True, disputants are increasingly driven away from exercising their right to a jury trial, in small part because there are attractive alternatives. But it is ultimately the defects of the civil jury trial itself, and society's failure to address those defects, that is the proximate cause of the civil jury's decline.").



140 L.Ed.2d 413 (1998) ("Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules," including Fed.R.Evid. 702); General Elec. Co. v. Joiner, -- U.S. --, 118 S.Ct. 512, 520, 139 L.Ed.2d 508 (1997) (Breyer, J., concurring).

Increasingly, the jury's search for truth requires assistance from those possessing expert knowledge: "Economic, statistical, technological, and natural and social scientific data are becoming increasingly important in both routine and complex litigation." JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 97 (April 2, 1990); Joiner, 118 S.Ct. at 520 (Breyer, J., concurring); C. Wright and V. Gold, FEDERAL PRACTICE AND PROCEDURE, § 6266, p. 265 (1996) (noting "modern courts have been confronted with a huge amount of expert testimony, some based on cutting-edge breakthroughs and some based on what has been called 'junk science'").

More expert testimony signals that lay juries are asked to resolve increasingly complicated issues generally beyond their experience and knowledge. Indeed, expert testimony is permitted only when an intelligent evaluation of the facts requires expertise and knowledge not possessed by the jury: "[T]here is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved or the dispute." Advisory Committee Notes, Fed.R.Evid. 702 (1972) (quoting Ladd, Expert Testimony, 5 Vand. L.Rev. 414, 418 (1952)). But, in our adversary system, where the litigants themselves choose and finance the expert witnesses, incentives exist that are capable of encouraging spurious and

unfounded expert opinions that sacrifice the truth-seeking process for financial gain.[6]

**1. The Proliferation in the Use of Expert Testimony Increases the Opportunity and Likelihood for Excess and Abuse.**

From 1898 to 1975, the Library of Congress catalogued 62 volumes in its "Evidence, Expert -- United States" category. Since 1975, it has similarly catalogued 203 volumes. These titles include volumes that should give us pause:

Expert Witness Handbook: Tips and Techniques for the Litigation Consultant, Poynter, Dan, (Call Number in Progress) (1997);

Effective Expert Witnessing: A Handbook for Technical Professionals, Matson, Jack, KF8961 .M38 1994 (1994);

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[6]For criticism of the use of adversary system and the expert's role, see generally, John H. Langbein, The German Advantage In Civil Procedure, 52 U. Chi. L. Rev. 823, (1985) ("The European jurist who visits the United States and becomes acquainted with our civil procedure typically expresses amazement at our witness practice. His amazement turns to something bordering on disbelief when he discovers that we extend the sphere of partisan control to the selection and preparation of experts. . . . In the German system, experts are not even called witnesses. They are thought of as 'judges' aides'. . . . Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune. Opposing counsel undertakes a similar exercise, hiring and schooling another expert to parrot the contrary position. The result is our familiar battle of opposing experts. The more measured and impartial an expert is, the less likely he is to be used by either side.")



Testifying in Court: Guidelines and Maxims for the Expert Witness, Brodsky, Stanley, KF8965 .B76 1991 (1991);

The Effective Expert Witness: Proven Strategies for Successful Court Testimony, Warren, Robert, KF8961 .Z9 W37 1997 (1997);

The Expert Witness Survival Manual, MacHovec, Frank, KF8961 .M33 1987 (1987); and

Succeeding As an Expert Witness: Increasing Your Impact and Income, Feder, Harold, KF8961 .F43 1991 (1991).

Certainly, none of these books encourages the presentation of speculative opinions, but all of them further demonstrate the increasing market for expert opinions: "Indeed, expert witnessing is a growth industry." Matson, Effective Expert Witnessing, p. 183. See also, ABA Journal (August 1998) 116-120 (containing 126 classified advertisements placed by expert witnesses looking for work).

Expert witnessing is a growth industry because expert testimony is readily recognized as having a powerful influence on lay jurors. A decade before he authored the Court's Daubert opinion, Justice Blackmun recognized the "obvious" and powerful effect of scientific evidence:

> Scientific evidence impresses lay jurors. They tend to assume it is more accurate and objective than lay testimony. A juror who thinks of scientific evidence visualizes instruments capable of amazingly precise measurement, of findings arrived at by dispassionate scientific tests. In short, in the mind of the typical lay juror, a scientific witness has a special aura of credibility.

Barefoot v. Estelle, 463 U.S. 880, 928 n. 8, 103 S.Ct. 3383, 3412 n. 8, 77 L.Ed.2d 1090 (1983) (Blackmun, J., dissenting) (quoting E. Imwinkelried, Evidence Law and Tactics for the Proponents of Scientific Evidence, 33, 37 (E. Imwinkelried ed. 1981)).

Commentators agree, also voicing concerns that jurors are likely to defer to the presentation of expert testimony:

> [E]xpert opinion can undermine the ability of the trier of fact to decide issues correctly if the trier of fact is incapable of critically evaluating the reliability of that opinion. In addition, experts present themselves as people with special qualifications. As a consequence, there is a significant danger that a jury may view the expert as surrounded by an 'aura of infallibility.' Thus, even where the trier of fact has some basis for questioning the expert's reliability, it may be disinclined to do so. In an era where the opinions of professional witnesses are available for purchase in virtually every field of science and technology, a jury's unquestioning deference to expert opinion may seriously jeopardize accurate fact-finding.

Wright & Gold, FEDERAL PRACTICE AND PROCEDURE § 6262, pp. 182-183. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 595, 113 S.Ct. 2786, 2798, 125 L.Ed.2d 469 (1993) (quoting Weinstein, Rule 702 of the Federal Rules of Evidence Is Sound: It Should Not Be Amended, 1991, 138 F.R.D. 631, 632). See also, Charles Richey, Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Civil and



Criminal Jury Trials, 154 F.R.D. 537, 545 (July 1994) ("No one seriously questions the proposition that so-called 'expert witnesses' can add an aura of authority to any asserted opinion."). Unfortunately, this phenomenon will wreak havoc if it is not bridled.

**2. "Experience has shown that opposite opinions of persons professing to be experts, may be obtained to any amount . . ."[7]**

Unfortunately, Justice Grier's sardonic observation is more true today than when written 140 years ago. Circuit courts, district courts, and commentators have all bemoaned the unscrupulous "expert" willing to sell out the truth-seeking process:

> Having reasonably found that Alterman lacked the experience, training or education to testify as to crane defects, and that his "hired gun" background as an instant expert in an astonishing number of other areas suggested he "would not possess the professional safeguards ensuring objectivity," the court did not abuse its discretion in excluding his testimony. Tokio Marine & Fire Ins. Co., Ltd. v. Grove Mfg. Co., 958 F.2d 1169, 1175 (1st Cir. 1992) (excluding testimony of witness claiming "expertise" in 18 "dissimilar fields").
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> * * *
>
> "Like the Fifth Circuit, we are unprepared to agree that 'it is so if an expert

[7]Winans v. The New York and Erie Railroad Co., 62 U.S. 88, 21 How. 88, 16 L.Ed. 68 (1858).

says it is so.'" Alevromagiros v. Hechinger Co., 993 F.2d 417, 421 (4th Cir. 1993).

* * *

"Whether the expert would opine in economic valuation, advertising psychology, or engineering, application of the Daubert factors is germane to evaluating whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers." Watkins v. Telsmith, Inc., 121 F.3d 984, 990 (5th Cir. 1997).

* * *

"[T]he professional expert is now commonplace. That a person spends substantially all of his time consulting with attorneys and testifying is not a disqualification. But experts whose opinions are available to the highest bidder have no place testifying in a court of law, before a jury, and with the imprimatur of the trial judge's decision that he is an 'expert.'" In re Air Crash Disaster at New Orleans, La., 795 F.2d 1230, 1234 (5th Cir. 1986).

* * *

"The courts have had a difficult time in appropriately cabining the opinion testimony of 'scientific' experts ... the problem that 'junk science' has caused in the courtrooms, has not gone unnoticed." Berry v. City of Detroit, 25 F.3d 1342, 1349 (6th Cir. 1994) (referring to Peter W. Huber, Galileo's



Revenge, Junk Science In The Courtroom (1991)).

* * *

"The professional expert witness who testifies with scant regard for the truth is an old problem in tort as in other areas of litigation. Experts are nowadays often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.'" Albers v. Church of the Nazarene, 698 F.2d 852, 858 (7th Cir. 1983) (internal quotations omitted) (quoting Keegan v. Minneapolis & St. L.R.R., 76 Minn. 90, 95, 78 N.W. 965, 966 (1899)).

* * *

The tendered "expert" opinion "does little beyond demonstrating how vital it is that judges not be deceived by the assertions of experts who offer credentials rather than analysis. Our district judge was not snookered. Schroeder's affidavit exemplifies everything that is bad about expert witnesses in litigation. It is full of vigorous assertion (much of it legal analysis in the guise of banking expertise), carefully tailored to support plaintiffs' position but devoid of analysis." Minasian v. Standard Chartered Bank, plc, 109 F.3d 1212, 1216 (7th Cir. 1997).

* * *

"In this litigation, Dr. Swan's well-traveled opinions are no more than educated guesses dressed up in evening clothes." Hall v. Baxter Healthcare Corp., 947 F.Supp. 1387, 1407 (D. Or. 1996).

* * *

"Dr. Hoyt's analysis is driven by a desire to enhance the measure of plaintiffs' damages, even at the expense of well accepted scientific principles and methodology." In re Aluminum Phosphide Antitrust Litigation, 893 F.Supp. 1497, 1506-07 (D. Kan. 1995).

* * *

"An expert can be found to testify to the truth of almost any factual theory, no matter how frivolous." Jack B. Weinstein, Improving Expert Testimony, 20 U. Rich. L. Rev. 473, 482 (1986).

* * *

"It is quite apparent that experts are readily available to present essentially frivolous theories in an effort to defeat summary judgment motions, or to create reasonable doubt." Margaret A. Berger, A Relevancy Approach to Novel Scientific Evidence, 115 F.R.D. 89, 91 (1987).



### C. Unreliable Evidence Produces Unreliable Results, and Unreliable Results Undermine the Public's Confidence and Respect for the Civil Justice System.

In the introduction to its final report on Science and Technology in Judicial Decision Making, the Carnegie Commission on Science, Technology, and Government noted:

> The court's ability to handle complex science-rich cases has recently been called into question, with widespread allegations that the judicial system is increasingly unable to manage and adjudicate science and technology (S & T) issues. Critics have objected that judges cannot make appropriate decisions because they lack technical training, that jurors do not comprehend the complexity of the evidence they are suppose to analyze, and that the expert witnesses on whom the system relies are mercenaries whose biased testimony frequently produces erroneous and inconsistent determinations. If these claims go unanswered, or are not dealt with, confidence in the judiciary will be undermined as the public becomes convinced that the courts as now constituted are incapable of correctly resolving some of the most pressing legal issues of our day. There may be calls to replace the current system with new institutions and procedures that appear to be more suited to the demands of science and technology.

Carnegie Commission on Science, Technology and Government, Science and Technology and Judicial

Decision-Making: Creating Opportunities and Meeting Challenges (1993).

The Carnegie Commission also collaborated with the Federal Judicial Center to publish the Reference Manual on Scientific Evidence. In its introduction, the Manual echoed similar concerns about the future of the system if its critics went unanswered:

> The bedrock of [our] system is the adversary process, which depends on attorneys to present evidence on behalf of their clients, judges to make the necessary and appropriate rulings concerning admissibility, and juries to resolve disputed issues of fact. But when the adversary process yields conflicting testimony on complicated and unfamiliar issues and the participants cannot fully understand the nature of the dispute, courts may not be competent to make reasoned and principled decisions. . . .
>
> One need not fully share the opinions of critics to appreciate the existence of a problem that affects the administration of justice in the decision of particular cases and in the larger dimension of the public's perception of the courts.

Reference Manual on Scientific Evidence, Federal Judicial Center 1994, pp. 1-2.

Finally, the Attorney General's Tort Policy Working Group has recorded an "increasingly serious problem" of:

> reliance by judges and juries on noncredible scientific or medical testimony, studies or opinions. It has become all too "common"



> for "experts" or "studies" on the fringes of or even well-beyond the outer fringes of mainstream science or medical views to be presented to juries as valid evidence from which conclusions can be drawn. The use of such invalid scientific evidence (commonly referred to as 'junk science') has resulted in findings of causation which simply cannot be justified or understood from the standpoint of the current state of credible scientific and medical knowledge. Most importantly, this development has led to a deep and growing cynicism about the ability of tort law to deal with difficult scientific and medical concepts in a principled and rational way.

Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Prices and Insurance Availability and Affordability (February 1986).[8]

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[8] The sheer volume of research that has recently occurred examining the continued usefulness of the civil jury is overwhelming. Certainly, concerns that juries are incapable of evaluating complex issues of science and technology and are susceptible to being misled by spurious expert testimony are not the only criticisms of the civil jury system, but every author includes these criticisms. See e.g., Franklin Strier, Making Jury Trials More Truthful, 30 U.C. Davis L. Rev. 95 (Fall 1996) ("Antitrust, high-technology patent, securities, products liability, environmental, and medical malpractice litigation are but a sampling of areas where it is increasingly clear that the apotheosized lay jury is a malfunctioning anachronism. An especially perplexing task for lay jurors is to assimilate and select in some rational manner from the competing testimonies of expert witnesses. Because of the jury's ignorance and naivete, this task creates obvious potential for corruption of jury decision making."); Development in the Law: The Civil Jury, 110 Harv. L. Rev. 1408, 1489 (May

Public confidence must not be permitted to further erode. Public suspicion that the civil justice system is failing to appropriately manage and adjudicate science and technology issues must not be permitted to fester. Measures must be taken to infuse greater confidence in the reliability of the system's decisions.

"Courts are in the very business of erecting procedural devices from which fair, equitable, and reliable outcomes are presumed to flow." Callins v. Collins, 510 U.S. 1141, 114 S.Ct. 1127, 1129, 127 L.Ed.2d 435 (1994) (Blackmun, J., dissenting). Their basic objective is to ensure "that the truth may be ascertained and proceedings justly determined." No one can question that reliable outcomes result from reliable evidence; reliable outcomes do not result from unreliable evidence. As the Carnegie Commission, the Federal Judicial Center, and the Attorney General's Tort Policy Group each recognize, if the civil jury does not produce consistently reliable outcomes, public confidence in the civil justice system and the jury's role within it will be destroyed. The entire system will be

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1997) ("criticism of the civil jury has grown increasingly harsh in recent years") (cataloguing advantages and disadvantages in the civil jury and compiling the works of critics and proponents of the civil jury); David E. Bernstein, Junk Science in the United States and the Commonwealth, Yale J. Int'l L. 123, 176-177 (Winter 1996) ("As this Article has demonstrated, the growing misuse of scientific evidence in the courtroom, particularly in jury trials, is indeed well recognized throughout the common law world. Commonwealth commentators join American critics of junk science in asserting that lay juries are not competent to weed out dubious scientific testimony."); Joe S. Cecil, Valerie P. Hans, Elizabeth C. Wiggins, Citizen Comprehension of Difficult Issues: Lessons From Civil Jury Trials, 40 Am. U. L. Rev. 727 (Winter 1991); John H. Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823 (1985).



replaced with something capable of producing reliable outcomes.

Critics will charge such observations are fatalistic and overstated, and at present, they are. But, does a prudent physician withhold treatment from an ailing patient until after the patient's death? The civil jury, like the entire civil justice system, sustains its legitimacy only so long as it effectively uncovers the truth. Determination of the truth, after all, is the basic purpose of a trial, and "[a]ny practice that threatens the jury's ability properly to perform that function poses a similar threat to the truth-determining process itself."[9] An opportunity exists to enhance the discourse that occurs in our courtrooms; it is an opportunity to increase the reliability of the decisions rendered by those courts; it is an opportunity to buttress the truth-determining process itself. If it is ignored, we will eventually look back with regret because the civil justice system we know, along with the civil jury we jealously safeguard with constitutional protection, will be replaced.

"[T]he saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." Associated National Press v. National Labor Relations Board, 301 U.S. 103, 141, 57 S.Ct. 650, 659, 81 L.Ed.953 (1937) (Sutherland, J., dissenting) (commenting on his perception of encroachment of First Amendment guarantees).

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[9]Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966); Brown v. Louisiana, 447 U.S. 323, 334, 100 S.Ct. 2214, 2223, 65 L.Ed. 2d 159 (1980). Both Tehan and Brown were criminal cases, but no one seriously suggests that civil trials are less of a search for the truth.

**D. Permitting Trial Judges to Require That Expert Witnesses Testifying In Their Courtrooms Adhere to the Same Methodology That Experts in Their Field Employ to Ensure Reliability in Their Professional Work Will Only Enhance the Jury's Ability to Uncover the Truth.**

Daubert's "four guideposts" will not all equally apply to all fields of expert inquiry and testimony, but the trial judge's gatekeeper role is no less important when confronted with unreliable technical, engineering, or social science evidence than when confronted with the unreliable scientific evidence found in Daubert and Joiner. "Not every guidepost outlined in Daubert will necessarily apply to expert testimony based on engineering principles and practical experience, but the district court's 'preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue' is no less important." Watkins v. Telsmith, Inc., 121 F.3d 984, 990-91 (5th Cir. 1997) (quoting Daubert, 509 U.S. at 592-93, 113 S.Ct. at 2796). See also, Tyus v. Urban Search Management, 102 F.3d 256, 263 (7th Cir. 1996) ("Social science testimony, like other expert testimony . . . must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony 'adheres to the same standards of intellectual rigor that are demanded in [her] professional work.' At that level of generality, the Daubert framework is appropriate for all kinds of expert testimony. . . ."). Regardless of the nature of the expert testimony presented, the "application of the Daubert factors is germane to evaluating whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers." Watkins, 121 F.3d at 991.



Daubert stands for the general proposition that the trial court's gatekeeping function is inherent in admitting all expert testimony, and Joiner reaffirms that the admissibility of expert testimony is left to the trial court's sound discretion. The appropriate considerations, undoubtedly, will be flexible, varying with the type of expert being offered.

The trial judge can and should identify the equivalent to the "four guideposts" that experts in the particular field use to ensure the reliability of their professional conclusions. This allows the trial judge to understand how experts in the particular field test reliability in their profession outside the courtroom. Often, these will be one or more of the factors the Daubert court identified because these factors are commonly employed by persons conducting an objective inquiry regardless of the field: "The non-exclusive list of factors relevant under Daubert to assessing scientific methodology- testing, peer review, and 'general acceptance' – are also relevant to assessing other types of expert evidence." Watkins, 121 F.3d at 991.

In this case, the district court judge probed the reliability of Dennis Carlson's proposed testimony, seeking any minimal indicia of reliability. He found none. Carlson suggested that there were no tests or procedures that could be used to corroborate or refute his opinions. Carmichael v. Samyang Tires, Inc., 923 F.Supp. 1514, 1520 (S.D. Ala. 1996). Carlson conceded that no publications or professional research validated his methodology. Carmichael, 923 F.Supp. at 1521. Carlson also admitted that neither he nor anyone else had conducted any objective inquiry to gauge the reliability of his methodology in accurately distinguishing between tire failures caused by a defect versus tire failures that did not result from a defect. Id. Astonishingly, Carlson even admitted that "he does not know whether his previous analyses of failed tires have been

correct or incorrect." Id. In sum, Carlson presented the district court judge with *ipse dixit*. The district court judge did not abuse his discretion by requiring more.

## III. CONCLUSION

If an expert has not employed the methodology used by his or her profession to ensure reliability outside the courtroom, that expert's testimony in the courtroom can only impede the trial's sole source of legitimacy, its search for the truth. The costs of such perversions are great. Incorrect decisions will be rendered. Public confidence in the civil justice system will continue to erode, and the calls for radical reform will increase. Lost in this tumultuous sea of change will be the civil jury. DRI urges the Court to vacate the Eleventh Circuit's decision and affirm that the trial court's gatekeeping function, announced in Daubert, applies to all expert testimony.

Respectfully submitted,

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